

Michael O. Roc, ISB No. 4490
Jason G. Murray, ISB No. 6172
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
mor@moffatt.com
jgm@moffatt.com
19-111.20

U.S. DISTRICT COURT
U.S. BANKRUPTCY
DISTRICT

JUN 24

U.S. DISTRICT COURT
U.S. BANKRUPTCY
DISTRICT

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability
company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a
California limited liability company,

Defendant.

Civil No. 04-229-S-BLW

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S OBJECTION TO
MOTION FOR PRELIMINARY
INJUNCTION AND FOR
EXPUNGEMENT OF LIS PENDENS**

COMES NOW the above-named plaintiff, Recuperos, LLC, by and through its undersigned counsel, and submits its response to defendant's Objection to Plaintiff's Motion for Preliminary Injunction and Expungement of Lis Pendens as follows.

I. INTRODUCTION

In responding to the plaintiff's motion for preliminary injunction and for expungement of lis pendens, the defendant has proffered a number of arguments, most of which are circular, and

**PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTION
TO MOTION FOR PRELIMINARY INJUNCTION AND
FOR EXPUNGEMENT OF LIS PENDENS - 1**

BOI_MT2:550206.1

often contradictory, but none of which addresses the underlying problem which the defendant has created. At its most fundamental level, the issue at bar is whether defendant may be allowed to knowingly record several improper lis pendens, and at the same time seek to have those recordations remain a matter of public record, relying on the argument that this Court, *under whose caption the lis pendens were recorded*, lacks the ability to declare them invalid and order them released. Such a position strains credulity and attempts to circumvent the authority of the same Court whose jurisdiction the defendant fraudulently invoked as the basis for the improper conduct. The defendant contends that the lis pendens, which were directly related to the Asset Purchase Agreement ("Purchase Agreement") out of which the Mutual Settlement and Release Agreement ("Settlement Agreement") grew, are so unrelated to the pending declaratory action that this Court lacks supplemental jurisdiction. As will be shown below, not only does the court have jurisdiction to decide these issues, the plaintiff is entitled to the relief sought in its pending motion.

II. ARGUMENT

A. This Court has Full Authority to Adjudicate the Validity of the Lis Pendens.

In its objection to the plaintiff's motion for injunctive relief and for expungement, defendant relies primarily on the argument that this Court lacks supplemental jurisdiction under 28 U.S.C. 1367. The thrust of defendant's argument is that the lis pendens "deal with real property that was the subject of the parties' Asset Purchase Agreement," and that the "lis pendens do not relate to the Plaintiff's cause of action for declaratory judgment." Curiously, the lis pendens were recorded under the caption in this case, and yet defendant insists that the only proper forum in which to challenge the invalid lis pendens is in Colorado state court. In effect,

the defendant itself has invoked the jurisdiction of this Court. As plaintiff has already indicated in its moving papers, the Colorado lis pendens statute allows recordation *only after* the filing of a pleading "in an action in any court of record of [Colorado] or in any district court of the United States within [Colorado] wherein relief is claimed *affecting the title to real property.*" See Colorado Code Section 38-35-110 (emphasis added). Not only were the lis pendens recorded in the absence of *any* Colorado court action, they were recorded in such a manner as to suggest that they were connected to a pending federal court action in Idaho which, in defendant's own words, "deals solely with whether the plaintiff's [sic] can rightfully retain the \$306,155.15 [earnest money] deposit. . . ." See Objection to Plaintiff's Motion for Preliminary Injunction and Expungement of Lis Pendens (Dkt. No. 13) at p. 4.

Both plaintiff and defendant have pointed out in their briefing that the pending declaratory action does not affect title to, or an interest in, real property. In fact, defendant has flatly stated that the lis pendens were intended to "merely secure AFS's claim of damage against the Plaintiff." Dkt. No. 13, n.1. Despite the defendant's admission that the lis pendens were not a part of any valid action under the applicable statutes, defendant has abused the process in an effort to scuttle plaintiff's sale of the subject properties to another entity which was, unlike defendant, able to actually go forward with the purchase transaction. At the same time, defendant argues that this Court is unable to rule upon such tortious conduct because the action under which the lis pendens were recorded, i.e., this lawsuit, is unrelated to the subject properties. The contradiction in defendant's argument is glaring. Having disregarded the requirements for an effective recording, defendant now brazenly asserts that the lis pendens

should be left in place *because* they were unjustly recorded in connection with an action technically unrelated to any real property. *See* Dkt. No. 13, pp. 3-4.

Defendant's insistence that the lis pendens are wholly distinct from the declaratory action notwithstanding, it cannot argue in good faith that this Court lacks supplemental jurisdiction over the pending issues. Although there is a question as to whether it is even necessary to invoke supplemental jurisdiction in this matter, plaintiff will attempt to address defendant's arguments in turn.

The federal statute establishing supplemental jurisdiction provides as follows:

[In] any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over *all other claims that are so related to claims in the action within such original jurisdiction* that they form part of the *same case or controversy* under Article III of the United States Constitution.

28 U.S.C. §1367 (2004) (emphasis added).

Interpreting the supplemental jurisdiction statute, the Ninth Circuit Court of Appeals has determined that a claim is "part of the same case or controversy when it shares a 'common nucleus of operative fact' with the federal claims." *Bahrampour v. Lampert*, 356 F.3d 969 (9th Cir. 2004). Here, it is beyond dispute that the pending action for declaratory relief on the Settlement Agreement stems from the same "common nucleus of operative fact" as the improper recordation of the lis pendens, in that the lis pendens admittedly "deal with property that was the subject of the parties' Asset Purchase Agreement." *See* Dkt. No. 13 at p. 4. In making this argument, defendant has tried to separate the Settlement Agreement from the Purchase Agreement, even though the Settlement Agreement was executed by the parties as a direct consequence of defendant's failure to close the transaction as required under the Purchase

Agreement, and the corresponding breach of that agreement by defendant. Simply put, the Settlement Agreement exists solely because of the defendant's breach of the Purchase Agreement, and the subsequent declaratory action unquestionably arises from the same "nucleus of operative facts" which led defendant to improperly record the lis pendens. As a result, there is a clear basis for the assertion of supplemental jurisdiction in this matter. Defendant's argument that the Settlement Agreement is not binding is of no consequence in addressing whether it flows from the same facts and circumstances that led to the filing of the lis pendens. Instead of "creat[ing] a separate cause of action" by bringing the pending motion in the declaratory action as defendant suggests, plaintiff is simply seeking an appropriate remedy for conduct on defendant's part which not only stems from, but has occurred as a continuation of, the events giving rise to this lawsuit.

The distinction which defendant attempts to draw between the declaratory action and the Colorado lis pendens ignores the fact that the lis pendens admittedly "deal with real property that was the subject of the parties Asset Purchase Agreement." Dkt. No. 13, p. 4. Furthermore, the Settlement Agreement unquestionably was the result of defendant's failure to comply with the terms of the Purchase Agreement. And, the defendant admits in its briefing that, pursuant to the terms of the Asset Purchase Agreement, Idaho is the proper forum for claims arising from such agreement. Accordingly, the lis pendens and the present lawsuit are a part of the same "nucleus of operative facts," and supplemental jurisdiction is appropriate.

B. The Plaintiff is Likely to Prevail on the Merits of its Claim and Will Suffer Irreparable Harm if Relief is Denied.

Defendant next argues that entry of injunctive relief is inappropriate because there has been no showing that the plaintiff will suffer any irreparable harm if the lis pendens are allowed

to remain in place. *See* Dkt. No. 13, p. 4. Defendant contends, without any citation to authority, that money damages are not irreparable harm. Although defendant has focused almost exclusively on such irreparable injury element, the plaintiff is not required under the applicable caselaw to establish irreparable harm, if it can adequately demonstrate a likelihood of prevailing on the merits and that the balance of hardships tips sharply in its favor. *See Johnson v. State Board of Accountancy*, 72 F.3d 1427, 1429 (9th Cir. 1995); *Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996).

In the present case, there can be no question that plaintiff will prevail on the merits of the improperly recorded lis pendens. Plaintiff has already described in its opening brief precisely why the lis pendens are facially invalid. There is no colorable claim defendant can make to establish that the lis pendens were recorded after the filing of a pleading putting at issue the parties' respective rights to title or possession of the subject properties. Indeed, defendant freely admits that the lis pendens were not recorded in order to provide notice of such an action, but were instead recorded to "secure" a damage claim. *See* Dkt. No. 13, n. 1. The lis pendens are invalid, and defendant's admission demonstrates their impropriety. Nevertheless, defendant has attempted to gloss over its rather obvious abuse of process, arguing that it, and not plaintiff, will prevail on the merits.

In an effort to draw the Court's attention away from the strengths of plaintiff's case on the merits, defendant has offered several "legal theories" which it contends show a likelihood that defendant will prevail, although this argument is currently devoid of any evidentiary support or reference to legal authority supporting such theories. Specifically, the defendant argues that plaintiff breached the Purchase Agreement, that the earnest money was not paid to an

independent escrow agent, and that the Settlement Agreement was invalid. *See* Dkt. No. 13, pp. 8-9.

In the typical case, if one is to receive a preliminary injunction, such party must establish a likelihood of prevailing on the merits of its case in chief (*see Religious Technology Ctr. v. Netcom On-Line Communication Svcs.*, 923 F.Supp. 1231, 1242, n. 12 (N.D.Cal. 1995)). The present case, however, is postured somewhat differently. Here, the merits underlying the motion for preliminary injunction are those associated with the lis pendens claim, upon which defendant does not have a *colorable*, much less *prevailing*, argument. Plaintiff submits that the "merits" to be considered in deciding whether a preliminary injunction should be granted are grounded in the lis pendens statutes and the facial invalidity of the defendant's recordings.

Not only is there a strong likelihood that plaintiff will prevail on the merits currently at issue, but a balancing of the relative harm also weighs in favor of plaintiff. Defendant has taken issue with the Affidavit of Brian Naeve, which adequately sets forth the harm already occasioned by the inappropriate lis pendens, as well as the potential harm which may yet result as a result thereof.¹ Adequate foundation has been laid in Mr. Naeve's affidavit which qualifies him to discuss the impact that the lis pendens had on the pending sale of the subject properties. Mr. Naeve has affirmed that the recording of the lis pendens has "caused both the title company and the buyer of the Subject Properties to reassess their existing commitments and to seek additional,

¹ Not only has defendant filed a motion to strike portions of the Affidavit of Brian Naeve, which motion is addressed separately, but there is also reference to additional "argument" as to the "admissibility" of Mr. Naeve's affidavit in the Objection to Plaintiff's Motion for Preliminary Injunction and Expungement of Lis Pendens, which argument, plaintiff submits, is inappropriate as presented, in that it should have been included in the Motion to Strike itself. Plaintiff thus objects to this additional argument, and requests that it not be considered to the extent that it goes beyond the arguments presented in the Motion to Strike.

expensive and time-consuming assurances from the plaintiff.” *See* Affidavit of Brian Naeve (Dkt. No. 10), ¶ 9. In addition, Mr. Naeve has stated that “the new buyer . . . is extracting and attempting to extract additional financial and contractual concessions from the plaintiff.” *Id.* Defendant apparently believes that if the buyer has already extracted certain concessions, it cannot seek to extract more. *See* Dkt. No. 13, p. 6. The fact remains, however, that Mr. Naeve has presented qualified, admissible testimony that the recording of the lis pendens has already caused not only a delay in the closing of a \$10,000,000 transaction, but has also required plaintiff to make “financial and contractual concessions” as a result. That additional concessions may still be negotiated does not negate those which have already been extracted, and the fact that Mr. Naeve did not include precise dollar figures does not lessen the damage that has been done. Finally, Plaintiff has been harmed by the slander of title and the tortious interference with contract and prospective economic advantage occasioned by defendant’s wrongful conduct.

Defendant, on the other hand, will suffer absolutely *no* hardship if the injunctive relief is granted and the lis pendens are expunged. Defendant has acknowledged in its briefing that the lis pendens are intended to “secure” a “claim of damage” and are apparently unrelated to an actual claim affecting the title to the real property which defendant has wrongfully encumbered. Release of the lis pendens will not affect the “claim of damage” which has yet to be made by defendant. As of the date of this response, defendant has made no actual claim with respect to either the subject properties, or concerning the Settlement Agreement, other than to say that the latter is invalid.

Given the imbalance against plaintiff in weighing the relative hardships already suffered, and those which will continue to be suffered by plaintiff as long as the lis pendens remain in

place, as well as the substantial likelihood that plaintiff will prevail on the merits of the issues currently before the court, the motion for preliminary injunction should be granted.

C. The Issue of Bond is Not Dispositive in the Determination of Plaintiff's Motion.

Finally, defendant has argued that no preliminary injunction should issue because plaintiff has not yet posted a bond. Plaintiff acknowledges the requirement of Fed. R. Civ. P. 65(c). However, plaintiff submits that until such time as the Court establishes the security which shall be required in obtaining the requested injunctive relief, defendant's argument is premature. Plaintiff furthermore leaves to the sound discretion of the Court the amount that should be required, if any, as security. Defendant's request for the amount in controversy under the Settlement Agreement, however, bears no direct relation to the issues currently at bar, i.e., the improperly recorded lis pendens. Defendant has not, and indeed cannot, present any evidence that it will suffer any costs or damages if the injunctive relief is granted, as it has not established, nor even presented evidence concerning, any claim affecting the real properties which have been unjustly encumbered.

III. CONCLUSION

A lis pendens is an instrument which is intended to give constructive notice to the world that an action has been filed affecting title or right to possession of the real property described therein. Conspicuously absent from the lis pendens recorded by defendant, however, is reference to any action other than the above-captioned lawsuit. While defendant would apparently urge the Court that the attachment of the lis pendens to this case is merely a *pro forma* mistake, there can be no disagreement that there is no other pending action affecting title to the subject properties. Defendant is attempting to avoid expungement of several improper lis pendens to

which it has no valid claim, and is doing so on the grounds that the lis pendens have nothing to do with this action. The declaratory action is part and parcel of the failed attempt by defendant to purchase certain real property. However, having breached the Purchase Agreement, not only has defendant forfeited the earnest money deposit pursuant to the Purchase Agreement and, moreover, a valid Settlement Agreement, but it has also lost any claim affecting the real property at issue. In effect, the defendant is attempting to use the lis pendens as a mechanism for prejudgment attachment, which is an improper use of the lis pendens statutes. Because plaintiff has presented a significant likelihood of prevailing on the merits, and because the relative hardships affecting the plaintiff outweigh those affecting the defendant, the plaintiff's motion should be granted, a preliminary injunction issued, and the lis pendens expunged.

DATED this 24th day of June, 2004.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

Michael O. Roe – Of the Firm
Attorneys for Plaintiff

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 24th day of June, 2004, I caused a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTIONS TO MOTION FOR PRELIMINARY INJUNCTION AND FOR EXPUNGEMENT OF LIS PENDENS** to be served by the method indicated below, and addressed to the following:

Robert L. Chortek
BERLINER COHEN
10 Almaden Boulevard, 11th Floor
San Jose, CA 95113-2233
Fax: (408) 998-5388

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile

Wade Curtis
BELNAP & CURTIS PLLC
1401 Shoreline Dr., Ste. 2
P.O. Box 7685
Boise, ID 83707-1685
Fax: (208) 345-4461

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile



Michael O. Roe